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No. 91-1244

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

HYPOINT TECHNOLOGY, INC.,

*Petitioner,*

v.

HEWLETT-PACKARD COMPANY,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

LESLIE W. JACOBS
MARK A. GAMIN
THOMPSON, HINE AND FLORY
1100 National City Bank Building
Cleveland, Ohio 44114
(216) 566-5500

ROBERT A. SKITOL
*Counsel of Record*
JAMES A. MEYERS
PEPPER, HAMILTON & SCHEETZ
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 828-1200

S.T. JACK BRIGHAM III
MARCIA HOWE ADAMS
HEWLETT-PACKARD COMPANY
3000 Hanover Street
Palo Alto, California 94303
(415) 857-5816

Dated: February 25, 1992

*Attorneys for Respondent Hewlett-Packard Company*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

## QUESTIONS PRESENTED

Respondent disagrees with petitioner's formulation of the questions presented, because it mischaracterizes the record in this case. Respondent would state the questions presented as follows:

1. Does the decision below, based on a full trial record, that petitioner lacked antitrust injury because respondent's conduct was not anticompetitive conflict with the Ninth Circuit's decision in another case, based on a summary judgment record, that there was a triable issue whether plaintiffs in that case had met various elements of antitrust standing? If so, does that conflict warrant this Court's review?

2. In holding that petitioner lacked antitrust injury because respondent's conduct was not anticompetitive, did the court of appeals correctly find that respondent's conduct did not injure competition in the alleged market for service of respondent's computers in light of undisputed evidence that, *inter alia*, (a) no service firm existing at the time of the conduct at issue was injured by that conduct; and (b) new service firms entered the alleged market following that conduct?

## RULE 29.1 STATEMENT

Respondent Hewlett-Packard Company has no parent corporation and no subsidiary corporations other than wholly owned subsidiaries.

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## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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### PRELIMINARY STATEMENT

Respondent Hewlett-Packard Company ("HP") submits this opposition to the petition for a writ of certiorari. Petitioner HyPoint Technology, Inc. ("HyPoint") claims that (1) the decision below is in conflict with a decision of the Ninth Circuit and (2) the court of appeals below misapplied this Court's decisions concerning antitrust standing and injury. These assertions are incorrect. The court of appeals below held, based on a full trial record, that HyPoint

lacked antitrust injury to maintain this action because HP's conduct was not anticompetitive. That holding in no way conflicts with the Ninth Circuit's holding on summary judgment that there was a triable issue whether plaintiffs in that case had met various elements of antitrust standing. Nor did the court of appeals misapply this Court's antitrust standing and injury decisions. To the contrary, it correctly applied those decisions to the record in this case. Accordingly, review is not warranted.

## COUNTERSTATEMENT OF THE CASE

### A. Statement of Facts

1. HP manufactures, sells and services computers. It offers service to users of its computers on both contractual and time-and-materials ("T&M") bases. Under HP's contractual arrangements, the user pays a monthly fee and receives a broad array of services, including remedial and regularly scheduled preventive maintenance, site environmental surveys and, for certain HP systems, remote diagnostics and predictive support. Under a T&M arrangement, the user pays for labor (including travel) and parts on a per-incident basis to have an HP Customer Engineer repair malfunctioning equipment or perform other requested services. *See generally* Court of Appeals Joint Appendix ("C.A.J.A.") at 400-01, 403-11.

HP's standard response-time commitment for T&M service requests is that a Customer Engineer will arrive at the user's site within three working days of the user's call. For an additional charge, any user may purchase HP's Premium Response Option uplift and receive a faster response-time commitment for T&M calls. Prior to August 1, 1987 users could obtain

guaranteed four-hour response under this Option. Effective August 1, 1987 HP modified the Premium Response Option so that, for the same uplift fee, an HP Customer Engineer will arrive at the user's site within the next business day.

HyPoint buys and sells used HP computer equipment. *Id.* at 204-05. In addition, HyPoint sold insurance contracts to HP computer users to cover their expenditures for HP-provided T&M service. HyPoint had never sought or obtained any commitment from HP to continue offering guaranteed four-hour T&M response. It also knew that HP's literature had expressly warned that the offering was "subject to change without notice." *Id.* at 243-44, 708. Nevertheless, HyPoint contended that it had a business strategy that relied on use of HP's four-hour T&M response by HyPoint-insured computer users and that its insurance business was adversely affected by HP's change in the Premium Response Option. HyPoint brought a treble damage action under Section 2 of the Sherman Act, 15 U.S.C. § 2, claiming that the Premium Response Option modification constituted monopolization of an alleged market for "the maintenance and repair of HP hardware systems." C.A.J.A. at 19-20.[1]

2. In its statement of the case, HyPoint makes a number of factual assertions that form the foundation of its legal position that (1) the decision below is in

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[1] HyPoint's complaint also included counts for attempted monopolization, alleged violations of state law and injunctive relief. At trial, HyPoint abandoned all but the damage claim for monopolization, and the sole claimed damages thereunder flowed from lost existing or potential contracts in its former maintenance insurance business.

conflict with a Ninth Circuit decision and (2) the court of appeals misapplied this Court's antitrust standing and injury decisions. These assertions are designed to create the impression that HyPoint was an efficient, independent competitor in the market it alleged for service of HP computers—something other than an insurer or reseller of HP service—and that the Premium Response Option modification injured both HyPoint and competition generally. While HyPoint's legal arguments are without merit even under its view of the facts, we nevertheless address HyPoint's numerous misstatements of fact, as required by Rule 15.1 of the Rules of this Court. As will be shown, resolution of the legal questions framed by HyPoint would require the Court first to accept a version of the facts that lacks record support and is contradicted by HyPoint's own evidence.

a. HyPoint makes two factual contentions to support its assertion that it was an efficient, independent competitor in the service market. First, it asserts that it did not simply rely on T&M service performed by HP Customer Engineers, but also used its own personnel to perform "depot repair and exchange." Pet. at 3-4.[2] Second, HyPoint cites several internal HP documents describing "competition" from HyPoint. *Id.* at 4-5. The testimony of HyPoint's own witnesses makes clear, however, that neither of these assertions supports the proposition that HyPoint was HP's competitor for antitrust purposes in the alleged market for service of HP computers.

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[2] Depot repair and exchange refer to service work performed at a central facility, not at the user's site.

As to depot repair, HyPoint's president testified that depot repair is used for service of peripheral equipment, such as terminals, which can be feasibly and efficiently taken off-site, not for service of hardware systems (i.e., central processing units ("CPUs") and disk drives), which are too large to be taken off-site. C.A.J.A. at 247-48. Further, according to his testimony, HyPoint's maintenance insurance program relied solely on HP's T&M service and did not include depot repair by HyPoint personnel. *Id.* at 219-21.[3] Thus, HyPoint's depot repair of terminals did not qualify HyPoint as a competitor in the market it alleged for the service of HP hardware *systems*.

HyPoint's complaint, which was filed after the T&M change and after HyPoint had entered into all of the contracts at issue in this case, squarely contradicts HyPoint's new characterization of its business. HyPoint there admitted (*id.* at 17-18) that it

> does not maintain its own inventories or employ its own service engineers. HyPoint participates in the business of maintaining HP systems by entering into service contracts with users of HP systems. When a user under contract with HyPoint needs service, HyPoint arranges and pays for an HP customer engineer to perform the service on a time and materials basis.

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[3] Consistent with this testimony, the "Services Provided by *HyPoint SERVICES*" section of HyPoint's form maintenance agreements stated only that HyPoint would "pay all charges associated with [HP's] travel, labor, parts and materials," and nowhere referred to any depot repair or other service to be performed by HyPoint.

HyPoint's president also admitted at trial that HyPoint never had a field service engineer who repaired HP systems at the user's site and that HyPoint could not itself service systems (i.e., CPUs and disk drives). *Id.* at 211, 247-48. HyPoint's computer industry expert also drew a sharp distinction between service of systems and depot repair of peripheral devices or subsystems. *Id.* at 302.

Moreover, HyPoint's witnesses testified only as to the existence and size of and HP's alleged power in a market for on-site service of HP hardware systems. HyPoint never introduced evidence on the existence and size of or HP's market share or power in a market including firms that provide depot repair service. Finally, as the court of appeals pointed out (*see* Pet. App. at 11a) and as HyPoint does not dispute here, HyPoint did not seek damages at trial for any injury to its depot repair business as a result of the Premium Response Option modification.[4]

As to the internal HP documents describing "competition" from HyPoint, the testimony of HyPoint's expert economist makes clear that such evidence is irrelevant to deciding whether, for antitrust purposes, HP and HyPoint were competitors in the alleged service market. HyPoint's economist testified that firms merely insuring or reselling service actually provided by others do *not* belong in the same market for purposes of antitrust analysis as the providers themselves. C.A.J.A. at 293-94. Moreover, as with depot repair firms, HyPoint introduced no evidence on the

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[4] The Premium Response Option modification could not have had any impact on depot repair work, where response time is not critical.

size, composition or HP's share of a market including such insurers or resellers. Such a market, by HyPoint's admission (*see* HyPoint C.A. Br. at 4, 9 n.9), would have to include such industry giants as IBM and Digital Equipment Corporation (which in some circumstances act as insurers or resellers of HP service). The inclusion of such firms in the relevant market would destroy HyPoint's contentions that HP has monopoly power and that there is a market limited to service of HP systems.

b. HyPoint makes three general factual contentions to support its assertion that the Premium Response Option modification injured competition: (1) HyPoint "went out of business" as a result of that change; (2) there was no evidence either that new competitors entered the service market after that change or that the change made it easier for competitors to enter the service market; and (3) consumers were injured as a result of the change by being forced into signing higher-priced service contracts from HP. Pet. at 5, 9 n.1. HyPoint's own evidence disproves each of these assertions.

HyPoint's assertion that it went out of business after HP modified the Premium Response Option is false. HyPoint's president admitted that the company continued in the depot repair business after the T&M change and that the T&M change never even threatened HyPoint's other line of business, the buying and selling of used HP equipment. C.A.J.A. at 230; Dist. Ct. Rec. 235 at 118. And, while HyPoint's owners did abandon the insurance business after filing this case, they then entered the HP system service business by acquiring a small, Maryland-based independent service organization ("ISO") for no money down.

C.A.J.A. at 236-38. In no more than 6-8 months, they had expanded that business into what they describe as a "nationwide field organization." *Id.* at 712.

HyPoint's assertion that "there was no evidence that new competitors entered the market" (Pet. at 5) is disproved by the trial testimony of HyPoint's computer industry expert that, as of October 18, 1987, $2^1/_2$ months after the T&M change, the number of ISOs had increased from 8 to 10. Dist. Ct. Rec. 237 at 142. He also testified that, in the "1988 time frame," there were 11 ISOs. C.A.J.A. at 312.[5] Similar evidence contradicts HyPoint's assertion (Pet. at 9 n.1) that there was no record evidence that the Premium Response Option modification made it easier for service competitors. There was uncontroverted evidence—based upon a survey of ISOs performed by the organization owned and operated by HyPoint's computer industry expert—that many ISOs thought that the T&M change would help their businesses while no ISO thought that the change would hurt its business. C.A.J.A. at 539. There was no evidence that the T&M change injured any ISO that provided its own service or that any ISO left the business as a result of the change.

HyPoint seeks to show consumer injury by asserting that "after HP changed its policy, if a customer wished to receive service within four hours, that customer would be forced to contract with HP at a higher

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[5] The acquisition and expansion by HyPoint's owners of a local ISO into a national ISO also counts as new entry. United States Dep't of Justice Merger Guidelines § 3.3 n.20 (1984) (entry occurs "as fringe firms currently in the market greatly expand their current capacity").

price." Pet. at 5. But the uncontroverted evidence was that numerous ISOs also offered four-hour response time both before and after HP's Premium Response Option modification. HyPoint's president admitted that, following the T&M change, HyPoint could have received nationwide four-hour response from two ISOs. C.A.J.A. at 256. Indeed, as discussed above, the ISO that HyPoint's owners acquired after they filed their complaint here and abandoned the insurance business offers four-hour response time nationwide. *Id.* at 249, 251-52, 717.

There is simply no record evidence that customers generally were forced into higher-priced service arrangements (either from ISOs or from HP itself) as a result of the Premium Response Option modification. The only evidence as to prices paid by consumers after the change was that one customer paid less for an HP service contract after the T&M change than for the insurance arrangement it had at the time of the change (*id.* at 637-38), while another paid more for better and additional service under an HP service contract than it had received under its insurance arrangement (*id.* at 631).[6]

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[6] The pages of the record cited by HyPoint to support its assertion that consumers were forced into higher prices (C.A.J.A. at 229-30, 382) do not support that proposition. The first portion is the testimony of HyPoint's president that, in an action unrelated to the Premium Response Option modification, HP raised its T&M labor rate. But HyPoint never challenged that separate action as illegal or claimed damages from it. The second portion is the testimony of an HP user formerly insured by HyPoint that she did not believe that HP was losing money by offering guaranteed four-hour T&M response and that her preference for service by HP rather than by an ISO (*see id.* at 385-386) resulted in her having to sign a service contract with HP.

**B. Course of Proceedings and Disposition Below**

1. HyPoint filed its complaint and a motion for preliminary injunction on September 23, 1987. The District Court granted HyPoint's motion, concluding, *inter alia*, that HyPoint had presented serious questions going to the merits of the case. The Sixth Circuit vacated the preliminary injunction, stating that "the record [did] not reveal that HyPoint ha[d] raised 'serious questions' for an antitrust violation." Order at 4, *HyPoint Technology, Inc. v. Hewlett-Packard Co.*, No. 88-3237 (6th Cir. Feb. 21, 1989) (attached to HP C.A. Br. at 10a).

2. A jury trial was held in April 1990. HP moved for, but was denied, a directed verdict at the close of both HyPoint's case and its case. The jury entered a general verdict in HyPoint's favor, responded to 6 special interrogatories and awarded HyPoint $500,000 in damages (prior to statutory trebling). The district court entered judgment upon the verdict and subsequently denied HP's motion for judgment notwithstanding the verdict or, in the alternative, a new trial. HP appealed on five grounds, including the fact that HyPoint lacked antitrust standing and injury to maintain this action.

3. The court of appeals reversed, with direction to enter judgment for HP. The sole basis for the court's decision was HyPoint's lack of antitrust standing. It did not reach any of the other grounds for reversal urged by HP (although it twice expressed serious doubt that HyPoint's market definition limited to service of HP computers was the appropriate relevant product market, Pet. App. at 6a, 12a). Contrary to HyPoint's characterization of the decision below, the court of appeals did not rule that HyPoint was not

a competitor in any sense. Rather, the court assumed that HyPoint was a competitor but held that it lacked antitrust standing because it had not shown that it had suffered antitrust injury, i.e., " 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.' " Pet. App. at 7a (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).

The court of appeals held that HyPoint had not shown antitrust injury because the Premium Response Option modification "had no anticompetitive impact. It was in fact beneficial to competing service organizations. . . . The elimination of the four-hour [T&M] response time also made it easier for new firms to enter the market, since it lowered the standard for service." *Id.* at 8a.[7] The court assumed that HyPoint competed with HP in the alleged market, but held that this assumed fact alone was not sufficient to confer antitrust standing on HyPoint. "[N]o injury to competition occurred as a result of HyPoint's elimination from the market," the court held, because "HyPoint had no potential to make . . . [HP] more efficient . . . . [HP] was free to reduce output and increase prices, the standard evils of monopoly power, to the same extent whether or not HyPoint existed." *Id.* at 9a.

The court of appeals also held that HyPoint had not suffered antitrust injury by virtue of performing

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[7] Thus, contrary to HyPoint's characterization of the decision below (Pet. at 5), the court of appeals did not hold that there was evidence that new competitors actually entered the market. In any event, the record supports such a holding. *See supra* at 8.

depot repair of peripheral equipment, because injury to HyPoint's depot repair business "was not the source of plaintiff's damages. The damages for which HyPoint sought compensation at trial resulted from the inability of HyPoint, after [HP's] policy change, to fulfill the terms of its contracts by using [HP's] T&M service, a circumstance arising solely from its *vicarious* service business." *Id.* at 11a (emphasis in original). Finally, the court held that evidence of HP's alleged intent to injure HyPoint was insufficient to confer antitrust standing on HyPoint. *Id.* at 11a-12a.[8]

## REASONS FOR DENYING THE WRIT

This case does not present either a substantial issue of federal antitrust law or a conflict among the courts of appeals. To the contrary, the court of appeals correctly and straightforwardly applied settled principles of antitrust standing and injury to the facts of record.

HyPoint does not urge the Court to provide an important interpretation or clarification of the law of antitrust standing and injury. Rather, it seeks only a reversal of the result in this case. The essence of HyPoint's petition is that the court of appeals misapprehended the facts. HyPoint then bootstraps that proposition into the arguments that the decision below conflicts with the Ninth Circuit's decision in *Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 1991-2 Trade Cas. (CCH) ¶ 69,665 (9th Cir. 1991), and that the court of appeals misapplied this Court's

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[8] On February 4, 1992 the court of appeals (upon HyPoint's motion and without objection from HP) stayed issuance of the mandate until April 6, 1992 pending disposition of HyPoint's petition for certiorari.

antitrust standing and injury cases. But the court of appeals correctly understood the record and applied the law, and its decision does not conflict with *Yellow Pages*. This Court should decline HyPoint's invitation to sit as a court of error.[9]

Moreover, this case is *sui generis*. The record shows that HP was the only computer manufacturer to make the offering on which HyPoint relied, and there was no evidence that anyone other than HyPoint and one other firm resold this offering. Thus, a decision by this Court would not have general application to firms throughout the economy; it would apply only to the litigants in this case. For all of these reasons, review is not warranted.

## I. THE DECISION BELOW DOES NOT CONFLICT WITH *YELLOW PAGES*

The principal reason HyPoint gives for granting the petition is that the decision below allegedly conflicts with the Ninth Circuit's decision in *Yellow Pages*. In *Yellow Pages*, defendant GTE published Yellow Pages directories. It also offered customers advice on the form, content and location of Yellow Pages advertising, and then placed advertisements in the appropriate GTE directories. GTE did not separately charge for these services but included the charge in its overall rate structure. Plaintiffs were not mere middlemen, resellers or insurers. Rather, they offered customers alternate services of the same kind as GTE's but, unlike HyPoint in this case, used their own sales and consulting personnel to provide them.

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[9] "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925).

At some unspecified time, GTE announced that it would end its longstanding practice of letting non-GTE consultants order, place and process Yellow Pages advertising on behalf of advertisers. Some of plaintiffs' customers subsequently canceled their contracts with plaintiffs. *See generally* 1991-2 Trade Cas. at 67,013-14.[10]

The district court granted GTE summary judgment on the ground that plaintiffs had failed to raise triable issues on antitrust injury and standing. The Ninth Circuit vacated and remanded. The court cited evidence that, in response to plaintiffs' substitute services, GTE told advertisers that it would help them reduce their Yellow Pages advertising, i.e., GTE would lower its price. *Id.* at 67,015. Accordingly, the court held that there were triable issues whether plaintiffs had the ability to impose price and quality discipline on GTE and whether plaintiffs had suffered antitrust injury. *Id.* It also held that plaintiffs had proffered sufficient evidence on the other elements of antitrust standing to avoid summary judgment. *Id.* at 67,015-17.[11]

The decision below does not conflict with *Yellow Pages*. HyPoint recognizes that the key factor in the

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[10] Contrary to HyPoint's suggestion (Pet. at 12), GTE did not drive the consultants out of business.

[11] Contrary to HyPoint's suggestion (Pet. at 8-9), the Ninth Circuit nowhere stated that plaintiffs had antitrust standing simply because they were "competitors" or allegedly provided consumers with a better or lower-priced product. Similarly, contrary to HyPoint's assertion that "an injury to competition was shown" in *Yellow Pages* (*id.* at 9), the Ninth Circuit expressly declined to rule on whether GTE's rate structure was anticompetitive. 1991-2 Trade Cas. at 67,013 n.1.

Ninth Circuit's decision was plaintiffs' ability to discipline GTE. Pet. at 8. But HyPoint never explains how it could have imposed any discipline on HP, nor does it ever confront the court of appeals' determinations that "HyPoint had no potential to make . . . [HP] more efficient" and that HP "was free to reduce output and increase prices . . . to the same extent whether or not HyPoint existed." Pet. App. at 9a.

The fundamental difference between the two cases is that, in *Yellow Pages*, plaintiffs could and apparently did discipline GTE while, in this case, there is no evidence or economic basis for believing that HyPoint could discipline HP. In *Yellow Pages*, plaintiffs used their own personnel to provide consulting services to their customers. In this case, HyPoint simply reimbursed its insureds for their use of HP's Customer Engineers.[12] Because plaintiffs in *Yellow Pages* used their own personnel, they could impose discipline: if GTE raised its price, it would lose business to plaintiffs; if GTE lowered its price, it would take business away from plaintiffs. Indeed, GTE apparently lowered its prices in response to plaintiffs' consulting activity. In this case, by contrast, there was no evidence that HP ever reduced its prices in response to HyPoint's maintenance insurance offering.

HyPoint contends that it could discipline HP because, in its capacity as a maintenance insurer, it allegedly deprived HP of significant levels of business.

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[12] Thus, HyPoint is wrong in asserting that "it participated in the market for HP service in the same way the consultants participated in the market for advertising in yellow pages." Pet. at 10.

Pet. at 12, 21-24. This contention is incorrect. HyPoint's insurance offering was not a form of price discipline. Rather, as HyPoint's president testified, that offering merely exploited a price disparity between HP's service contracts and HP's four-hour T&M response uplift; HyPoint gambled that, in light of the low failure rate of HP's systems, it could make money by reselling HP's four-hour T&M response uplift at a price between HP's price for that uplift and HP's price for its service contracts. C.A.J.A. at 215-18. Thus, as the Sixth Circuit explained when it vacated the preliminary injunction previously entered in this matter (*see supra* at 10), HyPoint was not "in competition with H-P to provide service. Rather HyPoint . . . [was] an arbitrager/insurer providing H-P's customers with H-P's service." Order at 2 n.1, *HyPoint Technology, Inc. v. Hewlett-Packard Co.*, No. 88-3237 (6th Cir. Feb. 21, 1989) (reprinted in HP C.A. Br. at 7a).

HyPoint's maintenance insurance offering thus did not constitute either price discipline or competition in any meaningful marketplace sense. Nor did it deprive HP of significant levels of business. Instead, that offering reflected no more than a short-term arbitrage opportunity that was eliminated when HP decided no longer to offer the four-hour T&M response uplift.

*Yellow Pages* and the decision below differ in other important respects. In this case, the court of appeals held that HyPoint had not suffered antitrust injury because it had not made the prerequisite showing of injury to competition. In *Yellow Pages*, the Ninth Circuit expressly declined to rule whether GTE's conduct was anticompetitive and directed much of its opinion to the question whether plaintiffs had satisfied the

other elements of antitrust standing (an issue that the court of appeals below did not discuss). Moreover, the court below, on the basis of a full trial record, held that HyPoint lacked antitrust standing and injury, while the Ninth Circuit, on the basis of a limited summary judgment record, held only that there was a triable issue whether plaintiffs had antitrust standing and injury.

In short, this case and *Yellow Pages* involve wholly different records, issues and procedural postures. In light of these differences, there is no conflict between the two decisions and thus no conflict between the courts of appeals requiring this Court's review.[13]

## II. THE DECISION BELOW CORRECTLY APPLIED AND IS FULLY CONSISTENT WITH THIS COURT'S ANTITRUST STANDING AND INJURY DECISIONS

While HyPoint asserts that this case presents novel issues (Pet. at 12), the essence of its second argument for granting the petition is that the court of appeals misapplied this Court's antitrust standing and injury decisions. Contrary to HyPoint's suggestion (*see id.*

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[13] Even if there were a conflict between the decision below and *Yellow Pages*, review would not be warranted because HyPoint does not identify any other court of appeals that has considered the allegedly similar questions this case and *Yellow Pages* present. "[T]here is already in place . . . a policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question." Justice Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230, 233 (1983) (quoted in R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 200 (6th ed. 1986)). And, while the decision below is strongly supported by other appellate decisions (*see* Pet. App. at 9a-11a), there is no appellate decision supporting *Yellow Pages*.

at 12-13), the court of appeals did not rule as a *per se* matter that firms such as HyPoint lack antitrust standing. Nor does HyPoint urge the Court to provide a new interpretation or clarification of the existing law of antitrust standing and injury. Rather, it merely seeks reversal of the decision below that, based on the facts of record in this particular case, HyPoint did not suffer antitrust injury and thus did not have antitrust standing. That holding does not warrant review.

The decision below is a straightforward application of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), which held that a private antitrust plaintiff

> must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

*Id.* at 489 (emphasis by the Court). Relying on *Brunswick*, the court of appeals stated that "[w]e are instructed in looking at the cause of the injury to look at whether the conduct was anticompetitive, and if it was not anticompetitive, standing is not shown." Pet. App. at 8a.

HyPoint does not challenge the legal holding that injury to competition is a prerequisite of antitrust injury, but instead challenges the court's factual determination that HP's conduct was not anticompetitive. The court held that HP's conduct—the Premium Response Option modification—was not anticompeti-

tive because it could not injure competitors in the alleged service market. The T&M change "was in fact beneficial to competing service organizations" by "ma[king] it easier for new firms to enter the market" and "lower[ing] the standard for service." Pet. App. at 8a.[14] Thus, HyPoint lacked standing as a competitor to challenge the change.[15]

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[14] HyPoint contends that the court of appeals' statement that an effective price increase is not anticompetitive "contradicts 102 years of antitrust jurisprudence." Pet. at 23. To the contrary, it is settled that even monopolists are free to charge monopoly prices. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 296-98 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *Paschall v. Kansas City Star Co.*, 727 F.2d 692, 704 (8th Cir.) (en banc), *cert. denied*, 469 U.S. 872 (1984). *See* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 710′ at 558 (Supp. 1991) ("[m]ere monopoly pricing is not a violation of the Sherman Act").

[15] HyPoint describes itself as a customer as well as a competitor (Pet. at i, 12), and cites *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (Pet. at i, 13-14), apparently to support its standing as a customer. These cases provide no such support. In *Hanover Shoe*, the Court held that a purchaser that had passed on overcharges to its own customers would still normally (though not always) be able to recover damages from the seller. In *Illinois Brick*, the Court held that indirect purchasers could not recover damages for overcharges passed on to them. In this case, HyPoint is not seeking, either as a direct or indirect purchaser, to recover damages for overcharges. The only damages for which HyPoint is seeking recovery flow from alleged lost actual and potential maintenance insurance contracts it sold or would have sold in purported competition with HP. HyPoint does not claim any damages in its alleged role as a purchaser. Accordingly, even assuming HyPoint correctly characterized its reimbursement for HP T&M service as purchasing activity, HyPoint nevertheless suffered no antitrust injury as a

The decision below is strongly supported by this Court's decisions in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884 (1990) ("*ARCO*"). In *Matsushita*, this Court held that competitors "stand to gain from any conspiracy" by other competitors "to raise the market price" and thus would lack antitrust injury to challenge such an action. 475 U.S. at 582-83. Similarly, in *ARCO*, the Court held that a competitor would lack antitrust injury to challenge a maximum price fixing scheme the alleged effect of which was to prevent defendant's dealers "from offering services desired by consumers," because such an effect would help rather than hurt the competitor. 110 S. Ct. at 1890.[16]

The holding below that HP's conduct was not anticompetitive because its natural effect would be to benefit competing service firms is fully consistent with *Matsushita* and *ARCO*. HyPoint tries to argue that holding is contrary to the record by asserting that there was no evidence that competitors actually benefitted from HP's conduct. *See* Pet. at 9 n.1. That assertion is legally unfounded and factually incorrect. As a legal matter, neither *Matsushita* nor *ARCO* requires record evidence that competitors actually benefitted. It was enough in both cases (as it should be

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purchaser. For these reasons, this case does not present HyPoint's second question presented (*see* Pet. at i).

[16] HyPoint mischaracterizes *ARCO* in asserting (Pet. at 19) that plaintiffs in *ARCO* in fact were helped rather than hurt by ARCO's conduct. To the contrary, the Court recognized that plaintiff had suffered losses as a result of ARCO's conduct, but held that those losses did not flow from an anticompetitive aspect of it. 110 S. Ct. at 1890-91.

here) that defendants' conduct could be expected as an economic matter to benefit competitors. As a factual matter, there was ample evidence—all supplied by HyPoint's witnesses—that new ISOs entered the market and that many ISOs thought that the Premium Response Option modification would help them while no ISO thought that the change would hurt it. *See supra* at 8.[17]

In the end, the essence of HyPoint's argument for antitrust standing is that its injury "was the direct result of HP's action" (Pet. at 18) and that, because the price of its maintenance insurance was lower than the price of HP's service contracts, the demise of its insurance business "by definition diminished competition" (*id.* at 21). The first statement is insufficient as a matter of law. In *ARCO*, this Court squarely held that "injury, although causally related to an antitrust violation, nevertheless will not qualify as 'antitrust injury' unless it is attributable to an anticompetitive aspect of the practice under scrutiny."

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[17] HyPoint asserts that HP's competitors must have been injured because "four-hour response was a prerequisite to servicing HP computers." Pet. at 9 n.1. That suggestion is specious to the extent it suggests that the availability of four-hour response from HP was a prerequisite for competing service firms to be in the business of servicing HP computers. There was no evidence that such response by HP was a prerequisite for competing *service* firms to enter or continue in the business or even that any such firm relied on four-hour T&M response from HP. Indeed, it makes no sense that ISOs, which by definition use *their own* service personnel to service *their* customers' systems, could be injured by HP's decision to drop a particular service to *its* customers. The only evidence was that HP's four-hour T&M response uplift was useful to HyPoint in its maintenance insurance business.

110 S. Ct. at 1889. Thus, it is not enough for HyPoint to claim that its injury directly resulted from the Premium Response Option modification. HyPoint had to—but did not—show more, i.e., that its injury resulted from an *anticompetitive* aspect of HP's conduct.

Moreover, HyPoint's demise as a maintenance insurer did not injure competition, even if its insurance premium was lower than HP's service contract price. Injury to HyPoint does not prove injury to competition. "[I]njury to the plaintiff alone is not sufficient to prove injury to competition." *Three Movies of Tarzana v. Pacific Theatres, Inc.*, 828 F.2d 1395, 1400 (9th Cir.1987), *cert. denied*, 484 U.S. 1066 (1988). Indeed, the "exclusion of one or even several competitors" raises no antitrust concern unless "it impairs the health of the competitive process itself." *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 394 (7th Cir. 1984) (Posner, J.). In this case, as discussed *supra* at 8, there was no evidence of injury to the competitive process. To the contrary, the undisputed evidence was that, following the Premium Response Option modification, new firms (including the one acquired by HyPoint's owners after they abandoned the insurance business) entered the business of servicing HP systems. And there was no evidence that any competing *service* firm (as opposed to insurance firm) was injured by the Premium Response Option modification.[18]

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[18] HyPoint seeks to draw parallels between this case and *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585 (1985), which involved defendant's withdrawal from a joint marketing arrangement. Pet. at 20. Unlike this case, however, *Aspen* did not involve antitrust standing and injury issues. Moreover,

## III. THIS CASE DOES NOT PRESENT ANY GENERALLY APPLICABLE ISSUE OF ANTITRUST LAW, SO A DECISION WOULD BE LIMITED TO THE LITIGANTS IN THIS CASE

The decision below does not raise any issue that is either generally applicable or likely to recur. The record below was clear that only HP offered the kind of service on which HyPoint relied (C.A.J.A. at 306, 326, 516-17), and there was no evidence that anyone other than HyPoint and one other firm resold this offering. More generally, there is no record evidence and HyPoint makes no showing in its petition that arrangements of the kind at issue in this case are pervasive in other sectors of the economy. To the contrary, HyPoint's computer industry expert testified that no company has spent more than four years in the maintenance insurance business. C.A.J.A. at 335-36. At bottom, this case involves only an idiosyncratic arbitrage opportunity created by the pricing disparity between HP's service contracts and its four-hour T&M response uplift. *See supra* at 16. There is no reason to believe this circumstance is common in the service industry, and thus no basis for believing that review of the decision below would be of importance to the economy as a whole or likely to recur. Review would affect only the parties to this case.[19]

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contrary to HyPoint's assertion (*id.*), plaintiff in *Aspen* did not merely resell defendant's destination resort skiing facilities. Rather, it operated its own ski resort and entered into a joint marketing arrangement with defendant (which operated three resorts) to offer a package of four resorts. In this case, by contrast, HyPoint never had a field service operation, and there was never a joint marketing operation of the sort found in *Aspen*.

[19] It is not even clear that review would affect the parties,

HyPoint asserts without more that this case raises important issues involving the service industry. As shown throughout this opposition, however, the decision below is sharply limited by the record and the peculiar nature of HyPoint's maintenance insurance business. Moreover, issues relating to the service sector of the economy are more appropriately presented by firms that actually participate therein, namely, service firms. HyPoint in its role as a maintenance insurer is not the proper party to raise any such issues.

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except by needlessly prolonging the litigation. As shown *supra* at 6-7, HyPoint presented market share and market power evidence only as to an alleged market limited to firms providing their own service on HP computers. HyPoint's evidence did not include either (1) firms that provide depot repair or (2) firms (including IBM and Digital Equipment Corporation) that also arrange for service by others. Accordingly, there is no evidence that HP has monopoly power—a requirement of a Section 2 monopolization claim (*United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966))—in the market as HyPoint would now define it. Moreover, the court of appeals reached only one of five grounds for appeal advanced by HP, and did not reach other grounds (for example, HyPoint's failure even to proffer evidence as to the proper definition of the geographic market, another requirement of a Section 2 claim) that would be equally dispositive of this case.

## CONCLUSION

For the foregoing reasons, HyPoint's petition for a writ of certiorari should be denied.

Respectfully submitted,

LESLIE W. JACOBS
MARK A. GAMIN
THOMPSON, HINE AND FLORY
1100 National City Bank Building
Cleveland, Ohio 44114
(216) 566-5500

ROBERT A. SKITOL
*Counsel of Record*
JAMES A. MEYERS
PEPPER, HAMILTON & SCHEETZ
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 828-1200

S.T. JACK BRIGHAM III
MARCIA HOWE ADAMS
HEWLETT-PACKARD COMPANY
3000 Hanover Street
Palo Alto, California 94303
(415) 857-5816

*Attorneys for Respondent Hewlett-Packard Company*

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